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Article 11

Torts - Right of Privacy

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as above.[8] By way of explanation the Restatement of the Law of Torts says:

> "The actor's conduct must be a substantial factor in subjecting the other to fear or other emotional disturbance. Furthermore, the act done must be a normal response to the fear or disturbance. If after the event, and knowing that the fear or disturbance has been created, the act done or its impulsions appear highly extraordinary it is not a normal response to fear or disturbance."[9]

It must be remembered that in determining whether this act was "normal" or not, the court or jury is looking back at the event and knows the situation, including the character of the one subjected to the stimulus, and decides from these facts whether the act was extraordinary or not.[10] Under this definition of "normal," as opposed to extraordinary, defendant Butler's act might be considered normal. Certainly he was acting in response to a stimulus of fear caused in the first instance by Knudsen's act. It might well be argued that this reaction in a supposed emergency was not an efficient intervening cause, but merely a reaction to a stimulus, in itself incapable of breaking the chain of causation.

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Torts—Right of Privacy—"The Saturday Evening Post" published an article entitled "Never Give a Passenger a Break." The author, joined as a defendant, was merciless in his ridicule of taxicab drivers in Washington, D.C. He pictured them as dishonest opportunists, ever ready to overcharge a patron not thoroughly familiar with the complicated zone system. The plaintiff was an operator of a taxicab, and her photograph was used to illustrate the article in question. Plaintiff's name was not mentioned in the text. She sued for damages for libel and for a violation of her "right of privacy" by reason of the publication of the photograph. The case was heard on defendant's motion to dismiss the complaint on grounds of insufficiency. *Held:* "Publication of a photograph of a private person without his sanction, unless by reason of his position or achievements he has become a public character, constitutes a violation of the 'right of privacy,' for which an action for damages will lie." *Peay v. Curtis Publishing Company et al,* (D.C., D.C., 1948) 78 F. Supp. 305; *Fowler v. Curtis Publishing Company et al,* (D.C., D.C., 1948) 78 F. Supp. 303.

This decision adds another jurisdiction to the growing weight of authority that there is such a thing as the "right of privacy," a right

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[8] Fn. 4, *supra.*
[9] Restatement of the Law of Torts, Sec. 444 (c).
[10] Fn. 4,*supra.*

first discussed by Warner and Brandeis in 1890.[1] The question was open in this jurisdiction, as it was not definitely answered in *Elmhurst v. Pearson,*[2] decided in 1945.

It is stated by the authorities that this right was unknown at common law, and this is explained by the statement that the law is not static, but changes and develops to meet new conditions of life. In early Anglo-Saxon history, the courts were more interested in protecting life and property than providing a remedy against the sting of ridicule. This did not mean that such a right did not exist, but rather that first things were put first. As the law grew and developed with civilization more attention was given naturally to the other interests of men, previously not protected by law. At first, any recovery was based on a right of property, breach of trust, or nuisance, in an attempt to fit a new concept into an already existing category. The result was a multitude of decisions, notable for circuitous reasoning. The first "break" came in 1902 in New York in a famous four to three decision,[3] denying the right of privacy. The strong dissenting minority view came to be law through decisions in most states,[4] and statutes[5] covering a limited number of aspects in others. In 1904, in an elaborate and well considered opinion, The Supreme Court of Georgia in *Pavesick v. New England Life Insurance Company,*[6] unanimously adopted the minority view in the New York decision. The language of the Georgia case is quoted at length in the instant decision. It is interesting to note that the circuitous reasoning of the earlier cases is being discarded, and the basis of the right of privacy is found in the natural moral law.

> "The right of privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters publis so far as the individual is concerned. Each individual as instinctively resents and encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of

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[1] Warner and Brandeis, "Right of Privacy," 4 Harv. L. Rev. 193 (1890).
[2] 80 U.S. App. D.C. 372, 153 F. (2d) 467 (1945).
[3] Roberson v. Rochester Folding Box Company, 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478, 89 Am. St. Rep. 828 (1902).
[4] For a complete history and background of the "right of privacy," see 138 A.L.R. 27; 39 Mich. L. Rev. 526.
[5] Sec. 50, Civil Rights Law, Consolidated Laws of N.Y., C.6.
[6] 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (1904).

a public nature. A right of privacy in matters purely private is therefore derived from natural law."[7]

To date there are only three states in the Union and District of Columbia which have not, in some form, recognized an enforceable right of privacy. Michigan, a long holdout since *Atkinson v. John E. Doherty & Company*,[8] is now definitely committed to the majority view by the recent case of *Pallas v. Crowley Milner & Company*,[9] which also involved the unauthorized use of plaintiff's photograph. Rhode Island[10] has expressly considered and unequivocally repudiated enforcement of the right. Washington[11] had a clear cut opportunity to invoke the doctrine in an instance where the plaintiff, daughter of an embezzler, sued for damages for the unauthorized use of her photograph in a newspaper account of her father's escapades. The Court admitted the right, but denied the remedy, following Rhode Island. Wisconsin is apparently committed to the same view since *Judevine v. Benzies-Montayne Fuel & Warehouse Company*,[12] a case where the defendant advertised a debt of $4.32 owing from plaintiff for sale. Justice Fowler, after an admitted cursory examination of the authorities, concluded that it was for the Legislature to enforce such a right. Comments on the case since that time indicate that Wisconsin is definitely with the minority group.[13] The case does not go that far. There is earlier authority in Wisconsin supporting the majority view. In *Schultz v. Frankfort Marine Accident & Plate Glass Company*,[14] the plaintiff was allowed a recovery for defendant's act of causing plaintiff to be kept under constant surveillance by detectives to his public embarrassment and ridicule. Justice Timlin said:

"A conspiracy to libel plaintiff or to commit any other wrong to his person, reputation ,or property may, when damage follows, be the subject of a civil action."[15]

Although Wisconsin is said to be on the minority side of the ledger, in view of recent decisions in other jurisdictions, Wisconsin may join the weight of authority in a proper case.

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[7] *Ibid* at p. 194, at p. 69 of 50 S.E., quoted at p. 307 of 78 F. Supp.
[8] 121 Mich. 372, 80 N.W. 285, 46 L.R.A. 219, 80 Am. St. Rep. 507, (1899).
[9] 33 N.W. (2d) 911 (1948).
[10] Henry v. Cherry and Webb, 30 R.I. 13, 73 A. 97, 24 L.R.A., (ns) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006 (1909).
[11] Hillman v. Star Publishing Company, 64 Wash. 691, 117 P. 594, 35 L.R.A., (ns) 595 (1911).
[12] 222 Wis. 512, 525, 269 N.W. 295, 106 A.L.R. 1443 (1936), noted in 38 Wis. L. Rev. 140, 1947 Wis. L. Rev. 467.
[13] *Ibid.*
[14] 151 Wis. 537, 139 N.W. 386, 43 L.R.A., (ns) 520 (1913).
[15] *Ibid.*